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NO. 19284

IN THE SUPREME COURT OF THE STATE OF HAWAI'I

STANLEY R. TSUJI,	)	CASE NO.
	)	AB 93-443(H)
Claimant-Appellant,	)	(1-92-10190) (HON)
	)	
vs.	)	APPEAL FROM THE
	)	DECISION AND
STATE OF HAWAI'I;	)	ORDER DATED
DEPARTMENT OF PUBLIC	)	AUGUST 11, 1995.
SAFETY,	)	
	)	
Employer-Appellee,	)	LABOR AND
Self-Insured.	)	INDUSTRIAL
	)	RELATIONS APPEALS
	)	BOARD,
	)	STATE OF HAWAI'I
	)	
	)	

MEMORANDUM OPINION

Claimant-Appellant Stanley R. Tsuji (Claimant) appeals from the decision and order of the Labor and Industrial Relations Appeals Board (Board), which concluded that Claimant did not suffer a personal injury on May 25, 1992, arising out of and in the course of his employment.[2] We affirm the Board's decision.

I. BACKGROUND

In September 1986, Claimant began his employment as an adult corrections officer with the Hawai'i Community Correctional Center (HCCC). In May 1989, Claimant sought and received treatment from Craig Kadooka, M.D., for chronic symptoms of nasal congestion, sore throat, dry and burning eyes, and loss of smell for three to four months. On June 5, 1989, Dr.

Kadooka diagnosed Claimant as exhibiting allergic rhinitis and moderate small obstructive lung disease, which appeared to be consistent with exposure to irritative substances such as cigarette smoke. [2] Dr. Kadooka recommended that Claimant be indefinitely restricted from working in smoke laden areas until the smoking policy was changed or much improved air circulation was achieved.

Claimant was subsequently placed on modified duty status at HCCC and assigned to work in open-air buildings and other outdoor posts. Claimant remained on modified duty for three years.

On or about May 21, 1992, HCCC administrator, Beryl Iramina (administrator Iramina), notified Claimant that due to the replacement of the air conditioning chiller, redoing of the air vents, and institution of a "no smoking" policy in the prison complex, the air problems were rectified. Iramina then ordered Claimant back to full duty status. Claimant refused administrator Iramina's order and continued to work on modified duty status through May 22, 1992. Beginning on May 23, 1992, Claimant took sick leave and never returned to HCCC.

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[1] Claimant also raises claims for violation of the State Whistleblowers' Protection Act and Occupational Safety and Health laws, under Hawai'i Revised Statutes (HRS) Subsection 378-63 and 396-8, respectively. However, relief for violations of HRS subsection 378-63 must be brought in the circuit court where the alleged violation occurred. Similarly, employees who believe that they have been subjected to retaliatory discrimination in response to a filing of a complaint for Occupational Safety and Health violations may file a separate complaint with the Director of Labor and Industrial Relations under the authority of HRS subsection 396-8. Therefore, Claimant's HRS subsection 378-63 and 396-8 claims, as framed, are clearly outside the scope of this court's appellate jurisdiction in the instant case.

On May 26, 1992, Claimant sought treatment with Edward Lau, M.D. a general and vascular surgeon, and on May 27, 1992, he saw Leigh Sakamaki, M.D., a psychiatrist. Subsequent to consultation with these physicians, Claimant filed a worker's compensation claim for mental anguish from "(p)rolonged harassment and threats by supervisors and co-workers for almost three years ever since being on modified duties since 6-5-89. On 5-25-92(,) (sic) I was given a written order to resume my duty in the environment that already had damaged my lungs placing me on modified duties in the first place."

On June 18, 1993, the Disability Compensation Division, Department of Labor and Industrial Relations (Director), determined that Claimant suffered a stress injury, on May 25, 1992, which arose out of and in the course of Claimant's employment at HCCC. HCCC appealed the Director's decision to the Board. on August 11, 1995 the Board reversed the Director's decision. Upon receiving an unfavorable decision by the Board, Claimant filed a motion for reconsideration to the Board, which was denied. Claimant then filed the instant appeal.

II. STANDARD OF REVIEW

> (A)ppeals taken from findings set forth in decisions of the Board are reviewed under the clearly erroneous standard. Thus, this court considers whether such finding(s are) clearly erroneous in view of the reliable, probative, and substantial evidence on the whole record. The clearly erroneous standard requires this court to sustain the Board's findings unless the court is left with a firm and definite conviction that a mistake has been made.

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[2] On November 13, 1987, Claimant filed a separate claim for worker's compensation benefits for his respiratory condition. He was determined to be 5% impaired and awarded disability benefits.

> A conclusion of law () is not binding on an appellate court and is freely reviewable for its correctness. Thus, this court reviews (conclusion of law) de novo, under the right/wrong standard.

Diaz v. Oahu Sugar, Co., 77 Hawai'i 152, 155, 883 P.2d 73, 75-76 (1994) (quoting Tate v. GTE Hawaiian Tel. Co., 77 Hawai'i 100, 102-103, 881 P.2d 1246, 1248-49 (1994) (internal citations, internal quotation marks, and footnotes omitted)) (brackets in original).

III. DISCUSSION

Claimant contends that the Board erred when it determined that he did not suffer a compensable work injury on May 25, 1992, which arose out of and in the course of his employment under HRS subsection 386-3.[3]

Our review of the record establishes that there was ample evidence to support the Board's decision and order. Under HRS subsection 386-85(1),[4] it is presumed, in the absence of substantial evidence to the contrary, that a workers' compensation claim is for a covered work injury.[5] However, as recognized by the Board, Claimant failed to show that he suffered an injury. Claimant's failure to adduce such evidence is fully supported by the record.

Claimant alleges that he suffered "mental anguish" on May 25, 1992, four days after he received the order from administrator Iramina to return to full duty status.

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[3] HRS subsection 386-3 (1993) states in pertinent part:

> Injuries covered. If an employee suffers by accident arising out and in the course of the employment or by disease proximately caused by or resulting from the nature of the employment, the employee's employer or the special compensation fund shall pay compensation to the employee or the employee's dependents as herein provided.

The Board reviewed the Lau and Sakamaki medical records and determined that, based on the lack of documented psychiatric symptoms or treatment in the records, Claimant did not establish that he suffered any type of psychiatric injury. Specifically the Board noted that while Dr. Lau's clinical notes documented Claimant's desire to take a leave of absence from work, as well as his expressed refusal to work in the air-conditioned building, such notes were devoid of any psychiatric symptoms.

A review of Dr. Sakamaki's clinical records reveal a similar picture. Again, Claimant related his refusal to return to work in the air-conditioned building. However, while Dr. Sakamaki diagnosed Claimant as suffering from "acute situational stress," the clinical notes are devoid of specific and documented psychiatric symptoms and treatment plans.[6]

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[4] HRS subsection 386-85(1) (1993), states in pertinent part:

Presumptions. In any proceeding for the enforcement of a claim for compensation under this chapter it shall be presumed, in the absence of substantial evidence to the contrary:

(1) That the claim is for a covered work injury;

[5] See Royal State National Ins. v. Labor Bd., 53 Haw 32, 34-35, 487 P.2d 278, 280 (1971)

Based on the above, the record is clear that Claimant failed to establish that he sustained a psychiatric injury. The Board fully considered the lack of documentation of any psychiatric symptomology or treatment in Claimant's medical records. Accordingly, we hold that the Board did not err when it determined that Claimant did not suffer a compensable work injury which arose out of and in the course of his employment.

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[6] On December 21, 1993, Claimant was given an independent medical evaluation (IME) by Byron Eliashof, M.D., a psychiatrist, regarding his alleged May 25, 1992 injury. After examining Claimant, Dr. Eliashof opined:

> Mr. Tsuji did not develop a psychiatric disorder as a result of having been ordered to work in the closed air facility. Rather, it was a matter of personal preference and his difficulty relating to personnel there. He has been able to continue pursuing his studies toward (a) Master's degree in Business Administration and has been able to work 20 hours a week driving a taxi.

Furthermore, on February 20, 1994, Dr. Eliashof reviewed Claimant's medical reports prepared by Dr. Sakamaki and reaffirmed his opinion that Claimant did not display any symptoms of psychiatric disorder.

IV. CONCLUSION

Therefore, we affirm the decision and order of the Board.

DATED: Honolulu, Hawai'i, July 25, 1996.

On the briefs:

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